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Supreme Court, U.S.
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In the

# Supreme Court of the United States

October Term, 1991

TRANSAMERICA INSURANCE COMPANY,
TRI-STATE INSURANCE COMPANY OF MINNESOTA,
AND BAUMANN-FURRIE & COMPANY,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

JOINT PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

MEAGHER & GEER
James F. Roegge
*Counsel of Record*
Mark A. Bloomquist
4200 Multifoods Tower
Minneapolis, Minnesota 55402
(612) 338-0661

*Attorneys for Petitioner*
*Transamerica Insurance Company*

BASSFORD, HECKT, LOCKHART,
TRUESDELL & BRIGGS, P.A.
L. H. May, Jr.
3550 Multifoods Tower
Minneapolis, Minnesota 55402

*Attorneys for Petitioner*
*Baumann-Furrie & Co.*

LANG, PAULY &
GREGORSON, LTD.
Mark J. Johnson
440 IDS Center
Minneapolis, Minnesota 55402

*Attorneys for Petitioner*
*Tri-State Insurance Company*
*of Minnesota*

1992 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

## QUESTION PRESENTED

Should the federal common law rule that a statute of limitations runs when a plaintiff learns of facts putting it on inquiry notice of a possible fraud be changed so that the statute does not begin to run until the plaintiff has verified the facts which put it on inquiry notice?

## LIST OF PARTIES

The parties to the proceedings below and before this Court are Petitioners Transamerica Insurance Company, Tri-State Insurance Company of Minnesota and Baumann-Furrie & Company, and Respondent United States of America.

The parent corporation of Transamerica Insurance Company is Transamerica Corporation; Transamerica Insurance Company has no subsidiaries required to be listed pursuant to Rule 29.1; Tri-State Insurance Company of Minnesota and Baumann-Furrie & Company do not have any parent corporations or subsidiaries required to be listed pursuant to Rule 29.1.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

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TRANSAMERICA INSURANCE COMPANY,
TRI-STATE INSURANCE COMPANY OF MINNESOTA,
AND BAUMANN-FURRIE & COMPANY, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

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# JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on October 7, 1991.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 946 F.2d 581 (8th Cir. 1991), and is reprinted in the appendix hereto, page A-1.

The memorandum decisions of the United States District Court for the District of Minnesota (Murphy, D. J.) are not reported. They are reprinted in the appendix hereto, pages A-7 and A-12.

## JURISDICTION

Invoking federal jurisdiction under 15 U.S.C. § 714b(a) and 28 U.S.C. § 1345, the respondent brought this action in the District of Minnesota. On June 14, 1990, the District Court granted petitioner Transamerica's motion for summary judgment pursuant to the applicable statute of limitations, 15 U.S.C. § 714b(c). (A-7). On September 12, 1990, the District Court granted Tri-State's summary judgment motion on the same basis. (A-12). Judgments in favor of Transamerica and Tri-State were entered on December 14, 1990 and September 13, 1990, respectively.

Respondent United States of America appealed and by decision dated October 7, 1991, the Eighth Circuit entered a judgment and opinion reversing the District Court's summary judgments in favor of Transamerica and Tri-State. (A-1). No petition for rehearing was sought.

The jurisdiction of this court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

15 U.S.C. § 714b(c):

> No suit by or against the [Commodity Credit] Corporation shall be allowed unless (1) it shall have been brought within six years after the right accrued on which suit is brought * * *.

## STATEMENT OF THE CASE

Ghent Grain and Feed, Inc., a Minnesota corporation (hereinafter referred to as Ghent) was in the business of operating a grain elevator at Ghent, Minnesota and was licensed under the United States Warehouse Act (7 U.S.C. § 241-273) during the relevant calendar years, 1979 through August 23, 1983.[1] It was an approved

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[1]The United States Warehouse Act (7 U.S.C. § 241-273) was enacted by Congress in 1916 to improve the country's agricultural warehousing industry. Grain Elevator Task Force Report to the Secretary of Agriculture United States Department of Agriculture, August 18, 1981, page 1. Its primary objectives were to (1) protect producers and others who store their property in public warehouses; (2) assure the integrity of warehouse receipts as documents of title to be used as collateral for loans, and to facilitate trading in interstate commerce of agricultural commodities; and (3) set and maintain a standard for sound warehouse operations. 46 FR 59930, December 7, 1981.

The Act and its regulations, prior to July 1, 1982, required that each warehouseman applying for or conducting a licensed premises must maintain "total net assets available for the payment of any indebtedness" to the extent of 20 cents per bushel for the maximum number of bushels of grain that the warehouse could accommodate, but in no event could any warehouseman be licensed who held less than $10,000.00 of net assets for that purpose. 7 CFR § 102.6, Net Assets. If a deficiency arose in net assets required above the $10,000.00 minimum, that deficiency could be corrected by an increase in the amount of the warehouseman's bond. 7 CFR § 102.14.

The Secretary of Agriculture's authority in the supervision and monitoring of this requirement is set out generally in 7 U.S.C. § 267 as:

> The Secretary of Agriculture is authorized through officials, employers or agents of the Department of Agriculture assigned by him to examine all books, records, papers and accounts of warehouses licensed under this act and of the warehousemen conducting such warehouses related thereto.

depository of The Commodity Credit Corporation (hereinafter referred to as CCC) for the storage of grains owned or mortgaged by the CCC.

Defendants Tri-State Insurance Co. of Minnesota (hereinafter Tri-State) and Transamerica Insurance Company (hereinafter Transamerica) provided warehousemen's bonds to Ghent during the years in question pursuant to 7 U.S.C. § 247.[2]

Third party defendant Baumann-Furrie and Company (hereinafter referred to as B-F) provided Ghent accounting services for this period of time, including the preparation of semi-annual "review" financial statements and Form TW-51 "Financial Statement" reports required by the United States Department of Agriculture and the

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That statutory authority is augmented in the regulations. 7 CFR § 102.38(a) required the warehousemen to make "such reports, on forms prescribed and furnished for that purpose by the service, concerning the condition, contents, operation and business of the warehouse."

7 CFR § 102.39, entitled "Inspections, Examinations of Warehouse," required the warehouseman to permit any officer or agent. . . . to enter and inspect or examine. . . . the office thereof, the books, records, papers and accounts relating thereto and the contents thereof. . ."

[2] 7 U.S.C. § 247, entitled "Bond of Applicant for Warehouse License; Additional Bond"; provides, in part:

> Each warehouseman applying for a license to conduct a warehouse in accordance with his chapter shall, as a condition of the granting thereof, execute and file with the Secretary of Agriculture, a good and sufficient bond to the United States to secure the faithful performance of his obligations as a warehouseman under the terms of this Chapter and the rules and regulations prescribed hereunder, and of such additional obligations as a warehouseman as may be assumed by him under contract with the respective depositors of agricultural products in such warehouse . . . .

CCC.[3]

During these years, CCC stored grain in the Ghent elevator. On August 15, 1983, a 13 page handwritten draft of a June 30, 1983 restated financial statement for Ghent Grain was delivered to the United States Department of Agriculture office (hereinafter USDA) in Minneapolis. (L-1)[4] It indicated a change in Ghent's net worth as reported for the period ending June 30, 1983, from a positive $253,196.42 to a deficit of $148,081.21.

There is no dispute as to the date of that delivery. Frank Heili, the assistant director of the Kansas City Commodity Office, an agency of the USDA, confirmed that fact and described his agency's consequent actions in his deposition and trial testimony given in Buysse v.

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[3]Until mid-1982 the warehouseman was required to file a "financial statement," designated under those regulations and the provisions of the Uniform Grain Storage Agreement (UGSA), as TW-51. This was changed on July 1, 1982 to require the filing of accountant's unaudited financial statements as well.

The TW-51 Financial Statements were submitted yearly for review by the Agricultural Marketing Service as an agent of the United States Department of Agriculture and CCC to determine whether or not Ghent met those financial standards necessary to be licensed under the Federal Act and placed upon the approved list of depositories of CCC Grain. 7 CFR § 102.38(a); Paragraph 17(d) of that Uniform Grain Storage Agreement, dated July 1, 1978, executed by and between Plaintiff and Ghent Grain and Feed Co., Inc. which provides, in part:

> (d) Reports - The warehousemen shall furnish CCC such reports with respect to receiving, storing, conditioning and delivery of the grain and with respect to his financial condition, total inventory of grain, and outstanding storage obligations, as CCC may request . . . . (emphasis added)

[4]The restated financial statement is incapable of reduction and typesetting. Chief Deputy Lorson has directed petitioners to separately bind the financial statement and denote it as a Lodging.

Baumann-Furrie and Company, 448 N.W.2d 885 (Minn. 1989), tried in Lyon County, Minnesota, on January 13, 1987:

Q Would you tell the jury when you first became aware of problems at Ghent Grain and Feed based on those dates set out in Exhibit 141?

A On or about April the 15th, 1983.[5]

Q And what happened at that time?

A A pencil copy of a current financial statement was received in our Minneapolis area office.

Q And how did you become aware of that fact?

A Mr. Bromley (sp.) who is in charge of our Minneapolis area office notified me on the phone.

Q Do you remember what he said?

A He said there was an indication that Ghent Grain and Feed Company's financial statements we have received previously had been overstating

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[5]Heili corrected this testimony at Page 558 of the transcript:

Q I think your testimony, Mr. Heili, was that on or about August 22 after you had received a penciled financial statement with regard to Ghent Grain and Feed that you sent examiners to examine the warehouse, isn't that correct?

A It was August the 15th, I believe, when we first made the move to do the exam and the exam was performed on August 22.

(A-18)

net worth by approximately $400,000.

Q And what is the next thing that happened?

A I suggested to Mr. Bromley that he suggested an immediate examination at that warehouse.

Q And was that done, when was the examination conducted?

A I believe it was within a week, I don't have the exact date available right here.

Q I think in one of the documents we have looked at before the examination reports, I believe it shows that the examination was done on or about the 22nd of August, would that correspond with your recollection?

A Yes, I have a note here, special was performed on 8-22-83.

Q All right. When you say special, you are talking about a special examination?

A Yes, went out to do a special.

Q And what happened after that?

A On August 23rd of '83 the shortage which was found at that examination, the examination of August 22nd of '83 was reported to headquarters office in Washington, and to ASCS office in Kansas City, Kansas City commodity office.

Q And what happened after the shortage was reported?

A The normal procedure is that the commodity office will hold a meeting and discuss the circumstances.

Q And did that happen in this case?

A I presume it did, yes.

Q Did the results of that meeting -- what happened?

A As a result of the meeting on August the 25th, 1983 CCC removed the warehouse from the CCC list of approved warehouses.

Q Is that the kind of thing we talked about where you could no longer make loans against grain that's on deposit in the warehouse?

A Yes.

Q And is that also the thing we talked about where the Commodity Credit will remove its grain from the warehouse?

A Yes.

Q All right. Then, what happened?

A Then on the 26th of August, 1983, my office in Washington, D.C. which has suspension powers, I do not have suspension powers, I have to refer to Washington and they suspended the federal license of the warehouse.

Q And as of that point in time then was Ghent any longer licensed by either the state or the federal

authorities?

A No.

Q Could it after that suspension?

A As a warehouse?

Q Yeah, could it after that suspension have operated as a warehouse?

A Not as a public warehouse.

Q Was the elevator ever relicensed?

A No.

(A-16 through A-18)

As a result of the physical examination and audit of the grains by USDA on premise at Ghent on August 22, 1983, it was determined that Ghent, in addition to being financially insolvent, was over 11,000 bushels short of grains due and owing CCC. (A-19) Ghent filed its voluntary Petition in Bankruptcy on November 1, 1983. CCC was a named creditor and eventually received a distribution from the Bankruptcy Estate.

On August 18, 1989, some six (6) years and three (3) days after receipt by USDA of the handwritten financial statement, CCC commenced this action for the losses it alleges it sustained through the sale of its grains by the trustee in bankruptcy.[6]

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[6] 15 U.S.C. 714b(c) provides, in relevant part:

> No suit by or against the Corporation (Community Credit Corporation) shall be allowed unless (1) it shall have

By its complaint, CCC alleges:

> 7. During the time period covered by the licensed warehouse bonds identified in paragraphs 5 and 6 hereinabove, the principal reported in its financial statements provided periodically to plaintiff, ownership of grain that was not so-owned or was not in existence, and the plaintiff relied on misrepresentations to its detriment.

and

> 9. Commodity first became aware of a possible claim against the principal and its sureties when a warehouse examination of principal's warehouse on August 23, 1983 revealed a measured grain shortage.

and

> 11. Because of the existence of the bonds . . . on the dates of the occurrences herein complained of and the breaches by the principal of its storage contract obligations and of its duties as a public grain warehousemen, Transamerica and Tri-State are obligated for the lesser of Plaintiff's injuries or the penal amount of the bonds.

By Order dated June 14, 1990, the Federal District Court of Minnesota granted Petitioner Transamerica's Motion for Summary Judgment, ruling that the relevant Statute of Limitations prescribed under 15 U.S.C. §

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> been brought within six years after the right accrued on which suit is brought . . . .

714b(c) began its course on August 15, 1983 and that the claims of CCC are time-barred. (A-7) On September 12, 1990, the District Court granted Tri-State's comparable motion. (A-12)

In granting those orders, the District Court ruled:

> Even where the doctrine of fraudulent concealment applies, a cause of action accrues and the statute of limitations begins to run when the plaintiff receives notice of a possible claim and not at a later date when the plaintiff verifies the existence of the cause of action. See, Goellner v. Butler, 836 F.2d 426, 432 (8th Cir. 1988); Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 644 F.2d 690, 693 (8th Cir. 1981); Jensen v. Snellings, 636 F.Supp. 1305, 1309 (Ed. La. 1986).

(A-10)

and

> Transamerica has produced unrebutted evidence indicating that CCC received notice of its possible claim at least by August 15, 1983. The evidence indicates that, at that time, CCC possessed restated financial statements that revealed that Ghent had overstated its net worth by a large amount. The statements should have, and did, trigger an inquiry into the CCC's possible cause of action. CCC has not shown that it was entitled to have the statute of limitations tolled until it inspected the warehouse and verified its claims.

Id.

and

> After receipt of the financial statement on August 15, 1983, Plaintiff took immediate action to inspect Ghent's grain supply and began proceedings to suspend Ghent's federal warehouse license. Within only eleven (11) days, an inspection revealed grain shortages and Ghent's license was suspended. These undisputed facts show notice of a possible breach of Ghent's obligations. Tri-State has established its right to summary judgment.

(A-14)

The district court's ruling was appealed to the Eighth Circuit Court of Appeals by CCC. The matter was submitted on June 12, 1991 and by its opinion, dated October 7, 1991, the appellate court reversed the district court's rulings and remanded the matter for trial. In its ruling, the appellate court characterized the 13-page financial statement received by the USDA on August 15, 1983 as an "anonymous tip." In so doing, the appellate court conceded:

(1) That the district court had correctly relied upon the existing case law in its decisions:

> The district court correctly relied upon Eighth Circuit cases in holding that in cases involving fraudulent concealment, a cause of action accrues and the statute of limitations begins to run when the plaintiff receives notice of a possible claim and not later when the plaintiff verifies the

existence of the claim. See, Goellner v. Butler, 836 F.2d 426, 432 (8th Cir. 1988); Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 644 F.2d 690, 693 (8th Cir. 1981). (A-4)

(2) That there is no case law authority for its "anonymous source" ruling:

> Diligent and able counsel apparently have found no case, for none have been pointed out to the court, in which the knowledge of a plaintiff similarly situated to the CCC was based on information received from an unknown source. Our own canvas of the cases relied upon by the parties reveals none. There is little case law to guide this narrow decision. We can assume that if the corrected balance sheet was known to be from some source that should be reliable, the need for further investigation might not prevent the commencement of the limitations. We can assume that if the information received were in some way self-proving, its validity evident on its face, the period might immediately commence to run. (A-5)

and

(3) That its ruling is supported only by way of analogy with Fed. R. Civ. P. 11:

> No one knows to this day who supplied the information to CCC concerning the possibility of shortages in Ghent's grain inventory or where they got the information. We have little doubt but that if an attorney filed a suit based on such an anonymous tip that later proved

> to be from an unreliable source or that slight investigation would prove to be false, Rule 11 sanctions would be seriously considered. Although the rule is that the tolling of a limitation statute does not continue until the basis of a claim is completely verified, it should be delayed until such time as the plaintiff has the opportunity to conduct some investigation of one of two things: either the identity of the tipster which would validate the probability of the essential accuracy of the information, or sufficient facts to verify the probable accuracy of the information so received. (A-4)

The court of appeals has thereby installed a verification test until now rejected by the other circuits without the benefit of legal precedent or relevant authority.[7] It has done so, ironically, upon a set of facts in which there is no dispute that inquiry notice was provided. The reliability of the source of information necessary to trigger inquiry notice will, based upon this appellate court ruling, become a constant source of challenge by those who would attempt to avoid application of the statute of limitations until this Court either reverses the Eight Circuit's ruling, restoring the law to its prior state, or provides some measure or guideline to the quality and/or quantity of evidence necessary to place a claimant upon inquiry notice.

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[7]The Fed. R. Civ. P. 11 requirement that an attorney's knowledge, information and belief "found after reasonable inquiry" differs from the inquiry notice required under the relevant federal common law rule. The common law rule presupposes that the claimant cannot ignore those facts giving rise to his cause of action. The practice rule presupposes that the claimant's attorney cannot ignore those facts denying a cause of action.

## REASONS FOR GRANTING THE WRIT

**The Eighth Circuit's ruling that a statute of limitations begins only after the plaintiff has verified facts which have put it on inquiry notice of a potential claim is contrary to the established federal common law rule that a statute runs when the plaintiff becomes aware of facts putting it on inquiry notice. The Eighth Circuit's ruling creates uncertainty in what otherwise is a well-settled area of law and will result in a multitude of lawsuits in which courts will be required to examine the quantity and quality of information necessary to satisfy the Eighth Circuit's new "verification" rule.**

### Introduction

This action involves the federal common law rule governing when a plaintiff "discovers" an alleged fraudulent concealment of a cause of action such that the statute of limitations is no longer tolled and commences to run. The same rule governs when a cause of action for fraud itself accrues. The rule states that the statute begins to run when a plaintiff has actual knowledge of a wrongdoing or when the plaintiff learns of facts which would cause a reasonable person in a similar situation to inquire or investigate.

Here, respondent CCC was alerted to facts which excited its immediate inquiry when it received a detailed 13-page financial statement in its Minneapolis office on August 15, 1983. (L-1) The CCC admitted, and the Eighth Circuit acknowledged, that this information was sufficiently important such that the CCC immediately ordered a special investigation and inspection of the grain warehouse. The Eighth Circuit refused, however, to hold that the statute commenced to run on August 15, 1983,

the undisputed date the CCC was put on inquiry notice. Instead, the Eighth Circuit ruled that inquiry notice did not commence the limitation period because the CCC did not know the identity of the person providing the financial statement which excited the inquiry. The Eighth Circuit held that the statute of limitations commenced at some undetermined time after which the CCC would have had a reasonable opportunity to determine the reliability of the person providing the information or to verify the accuracy of the information provided. In so ruling, the Eighth Circuit abandoned the inquiry notice trigger for the statute of limitations and replaced it with a verification of inquiry notice trigger.

This Court should review the Eighth Circuit's erroneous ruling for a number of reasons. First, the ruling is contrary to law. Secondly, it injects uncertainty into a field of law which was heretofore well defined. Thirdly, if left to stand, it will spawn a new field of litigation concerning the quantity and quality of verification needed to commence the running of a statute of limitations after a party already has been alerted to the possibility of wrongdoing. Finally, if there indeed is to be a new "verification" rule, or any exception to or departure from the inquiry notice rule, then this Court should provide guidance as to scope and application of the new or modified rule of law.

## Discussion

Without the support of precedent from any court decision, the Eighth Circuit has grafted a new exception onto the well-established federal common law regarding the tolling of statutes of limitations. The Eighth Circuit's new "verification" requirement substantially destroys any continuing use of the previous established test used by all circuits.

Prior to the announcement of the Eighth Circuit's

new rule in this case, there were two distinct tests to determine when a statute of limitations would commence running. "Actual knowledge" of a wrongdoing was clearly sufficient. See, e.g., Vigman v. Community National Bank and Trust Co., 635 F.2d 455, 459 (5th Cir. 1981). Courts consistently recognized a second, alternative test which stated that the statute of limitations commenced running upon "notice of facts which, in the exercise of due diligence, would have led to actual knowledge [of the wrongdoing]." Id. The Eighth Circuit in this case acknowledged that the alternative inquiry notice is the correct and accepted rule of law.

> The district court correctly relied upon Eighth Circuit cases in holding that in cases involving fraudulent concealment, a cause of action accrues and the statute of limitations begins to run when the plaintiff receives notice of a possible claim and not later when the plaintiff verifies the existence of the claim.

(A-4) (citations omitted) (emphasis added). This alternative test has also been uniformly accepted by the other ten circuits across the country.[8]

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[8]Cook v. Avien, Inc., 573 F.2d 685, 696 (1st Cir. 1978) ("once the inquiry notice . . . triggered the duty to exercise reasonable diligence, the statutory period did not await appellant's leisurely discovery of the full details of the alleged scheme".) (citations omitted); Stull v. Bayard, 561 F.2d 429, 432 (2nd Cir. 1977) ("statute commences to run when the plaintiff has actual knowledge of the alleged fraud or knowledge of facts which in the exercise of reasonable diligence should have led to actual knowledge"); Tobacco and Allied Stocks v. Transamerica Corporation, 244 F.2d 902, 904 (3d Cir. 1957) (statute begins to run "if facts come to plaintiffs' attention that would warrant the inferences which reasonable men would draw, and that would put reasonable men on inquiry to protect their rights"); Johns Hopkins University v. Hutton, 488 F.2d 912,

The Eighth Circuit has now collapsed the alternative "inquiry notice" test into the "actual knowledge" test. Under its new test, the Eighth Circuit has decided that inquiry notice will not commence the running of the statute until an additional period of time is allowed for the plaintiff to conduct an investigation to determine the reliability of the source or the accuracy of the information itself. Where, however, inquiry facts are verified as to their reliability or accuracy, they become indistinguishable from actual knowledge. See Wood v. Carpenter, 101 U.S. 135, 143 (1879) ("the means of knowledge are the same thing in effect as knowledge itself"), quoted in Dayco Corp. v. Goodyear Tire and Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975).

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917 (4th Cir. 1973), cert. denied, 94 S.Ct. 1622 (1974) (statute begins to run when "he has such notice of the facts as would impel a reasonable man in his position to make inquiry."); United States v. Batson, 706 F.2d 657, 677 (5th Cir. 1983) ("in an action for fraud, or where there is fraudulent concealment, limitations does not begin to run, or is tolled, until the fraud is discovered or the plaintiff is put on inquiry that it has a potential claim"); Dayco Corp. v. Goodyear Tire and Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) (for statute of limitations purposes, "any facts that would excite the suspicion is the same as actual knowledge of his entire claim. Indeed, 'the means of knowledge are the same thing in effect as knowledge itself.'") (quoting Wood v. Carpenter, 101 U.S. 135, 143 (1879)); DeBruyne v. Equitable Life Assurance Society of the United States, 920 F.2d 457, 466 (7th Cir. 1990) ("limitations period begins to run even when a plaintiff is placed on 'inquiry notice' of possible misrepresentations"); Robuk v. Dean Witter & Co., Inc., 649 F.2d 641, 644 (9th Cir. 1980) (statute begins to run when plaintiff has "actual or constructive notice of the facts constituting the fraud. Constructive notice is knowledge of facts sufficient make a reasonably prudent person suspicious of fraud, thus putting him on inquiry."); Anixter v. Home-State Production Co., 939 F.2d 1420, 1437 (10th Cir. 1991) ("discovery period. . . does not commence only when a plaintiff has full knowledge of the existence of a claim. On the contrary, the one-year limitations period begins to run even when a plaintiff is placed on 'inquiry notice' of possible misrepresentations.") (citation omitted); Brock v. Nellis, 809 F.2d 753, 755 n.4 (11th Cir. 1987) (expressly adopting from the Fifth Circuit's ruling on inquiry notice as precedential).

The Eighth Circuit conceded that "there is little case law to decide this narrow decision." (A-5). The only support given for this new rule of law is reference to Fed. R. Civ. P. 11 which requires a good faith investigation of underlying facts prior to commencing litigation. (A-4). There is no parallel, however, between the "low level of awareness" needed to excite inquiry and a higher level of facts necessary to satisfy the good faith requirements of Rule 11. See, Jensen v. Snellings, 636 F.Supp. 1305, 1309 (E.D. La. 1986), aff'd in part, rev'd in part on other grounds, 841 F.2d 600 (5th Cir. 1988) ("[T]he limitations period is triggered by the discovery of facts which would cause a reasonable man to inquire whether he has suffered a legal wrong. The plaintiff need only possess a low level of awareness; he need not fully learn of the alleged wrongdoing. Knowledge of all facts is not required to set off a prescriptive clock. Thus, the clock begins to tick when a plaintiff senses 'storm warnings,' Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978), not when he hears thunder and sees lightning. (Emphasis in original)

The striking and unique feature of this case's facts, which convinced the District Court that summary judgment was appropriate, was that there was absolutely no question that the August 15, 1983 information put the plaintiff on inquiry notice. The CCC's assistant director agreed that he "became aware of problems" on August 15, as a result of the revised financial statement. (A-16). The undisputed evidence is that the discovery of this revised financial statement immediately started a chain of events which included a special CCC examination at the warehouse, the removal of the warehouse from the list of approved warehouses and the suspension of the warehouse's federal license. The Eighth Circuit's new rule of law directs that we ignore these facts and circumstances, even in a case such as this where the "storm warnings" proved to be undeniably accurate and

"thunder and lightning" immediately ensued. See Jensen, 636 F.Supp. at 1309.

Here we know, and the plaintiff admits, that the source of the information did prove to be reliable and the facts did prove to be true. The Eighth Circuit is engaging in sheer speculation when it holds that information received from an anonymous source can never rise to the level of inquiry notice to commence a statute of limitations. Although information from an unknown source may not be sufficient inquiry notice under other facts and circumstances, they undisputably created inquiry notice in this instance.

An off-cited federal district court opinion explains why suspending the limitations period to allow verification of identities and information after receiving undisputed inquiry notice is unworkable. See Tobacco and Allied Stocks v. Transamerica Corp., 143 F.Supp. 323 (D. Del. 1956), aff'd 244 F.2d 902 (3d Cir. 1957).

> Plaintiffs contend absent sufficient evidence of fraud, mere rumors and charges of wrongdoing do not impose any duty of diligent inquiry. . . . I find no basis for such a proposition. . . .
>
> It is impossible to lay down any general rule as to the amount of evidence or nature of evidential facts admitting discovery of fraud, but, facts in the sense of indisputable proof or any proof at all, are different from facts calculated to excite inquiry which impose a duty of reasonable diligence and which, if pursued, would disclose the fraud. Facts in the latter sense merely constitute objects of direct experience, and, as such, may comprise rumors or vague charges if

> of sufficient substance to arouse suspicion.

143 F.Supp. at 330-31. A rigid rule of law holding that the anonymity of a source of information will, as a matter of law, never arouse sufficient suspicion to create inquiry notice ignores the vast array of facts which may affect how we judge the quality of information. Where the information in question here includes many pages of detailed financial information and where it does indeed "excite inquiry" and produce a rapid investigation, the importance of the information cannot be doubted.

Perhaps the Eighth Circuit simply misunderstands an important feature of all statutes of limitation. The Eighth Circuit would allow a plaintiff six years after sufficient facts have been investigated and verified to commence a lawsuit consistent with Rule 11. On the contrary, as explained in a decision adverse to the CCC, the statute of limitations is the period of time afforded a plaintiff to turn inquiry notice into a sufficient basis for a lawsuit.

> A cursory check of easily ascertainable records would have led the committee, or any other representative of the Commodity Credit Corporation, to make further investigation; an additional six year period certainly seems a reasonable time within which the facts reasonably could have been discovered.

United States v. Rolenc, 345 F.Supp. 1260, 1262 (D. Neb. 1972). The facts which put one on inquiry notice commence the running of the statute. The plaintiff then has the requisite period of time set forth in the statute to verify those facts. The Eighth Circuit with its new rule would negate this principle entirely.

## CONCLUSION

For the foregoing reasons, petitioners respectfully request the Court grant their joint petition for certiorari.

Respectfully submitted,
Dated: January 6, 1992

/s/ James F. Roegge

**MEAGHER & GEER**

James F. Roegge
Attorney of Record
Mark A. Bloomquist
4200 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 338-0661
**Attorneys for Petitioner Transamerica Insurance Company**

**LANG, PAULEY & GREGORSON**

Mark J. Johnson
4400 IDS Center
Minneapolis, MN 55402
Telephone: (612) 338-0755
**Attorneys for Tri-State Insurance Company of Minnesota**

**BASSFORD, HECKT, LOCKHART, TRUESDALE & BRIGGS**

L. H. May, Jr.
3550 Multifoods Tower
Minneapolis, MN 55402
Telephone: (612) 333-3000
**Attorneys for Baumann-Furrie & Co.**

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# APPENDIX INDEX

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*The restated financial statement is incapable of reduction and typesetting. Chief Deputy Lorson has directed petitioners to separately bind the financial statement and denote it as a Lodging.

# United States Court of Appeals
# For the Eighth Circuit

**No. 90-5569**

| | |
|---|---|
| United States of America,<br>*Plaintiff-Appellant,*<br>v.<br><br>Tri-State Insurance Co. of Minnesota and Transamerica Insurance Company,<br>*Defendants-Appellees,*<br>v.<br><br>Baumann-Furrie and Company, James Welsh and Adeline Welsh,<br>*Third-Pary Defendants-Appellee.* | **PUBLISH**<br><br>**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.** |

**SUBMITTED: JUNE 12, 1991**
**FILED: OCTOBER 7, 1991**

Before LAY, Chief Judge, RONEY*, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM:

* The HONORABLE PAUL H. RONEY, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

In this case against the sureties of a bankrupt warehouse, the United States on behalf of the Commodity Credit Corporation (CCC) appeals from the dismissal of its claims as being time-barred. The issue is whether the running of the applicable six-year statute of limitations was triggered when an anonymous tipster placed under the door of a CCC satellite office a penciled-over financial statement suggesting the bankrupt has misstated to the CCC its net worth, its solvency, and the value of grain on hand was insufficient to put the Government on notice that it had a viable claim against the sureties such as to trigger the running of the period of limitations. We reverse and remand.

The Commodity Credit Corporation is a wholly-owned Government corporation which stored corn, soybeans and wheat with Ghent Grain & Feed, Inc., a public grain warehouseman. When Ghent failed to deliver all of the grain stored, CCC sought the value of the missing grain from Transamerica Insurance Company and Tri-State Insurance Company of Minnesota, the sureties on the indemnity bonds which secured the faithful performance of the warehouseman's obligations to CCC. Ghent failed to deliver the grain on the delivery date, October 15, 1983. On November 1, 1983, Ghent filed for bankruptcy. Almost six years later, the United States filed suit against the surety bonding companies on August 18, 1989. More than six years by three days before the filing of the suit, on August 15, 1983, representatives of CCC in Minnesota found a Ghent financial statement under a door with penciled-over markings showing that Ghent had overstated its net worth by about $400,000. The district court held that the applicable six-year statute of limitations[1] began to run upon receipt of that financial statement.

The rationale of that holding is this: Ghent breached its contract when it failed to have on hand sufficient quantities of grain to satisfy its contracts. Whenever

[1] 15 U.S.C. § 714b(c).

that event occurred, CCC had a cause of action. The six-year statute of limitations on that cause of action would be tolled until CCC discovered that event had occurred, the facts having been fraudulently concealed by Ghent. The financial statment it received on August 15, 1983 put CCC on notice that Ghent had breached its contracts. Therefore, the suit filed six years and three days after it received notice of the breach was untimely filed.

The Government argues the receipt of the anonymous, penciled-over balance sheet was insufficient notice of the breach of contract. The CCC did not "discover" the breach until August 23, 1983, after it inspected Ghent's warehouse, an inspection that was triggered by receipt of the anonymous tip. In any event, the Government argues as its primary point on appeal that its cause of action did not accrue until Ghent failed to deliver the grain on October 15.

This case is somewhat confused because of the lack of clarity with which the Government alleged and presented its case to the district court and on appeal. Since this is the faithful performance of Ghent on its contract with CCC in two respects: first, that Ghent would keep adequate grain inventories on hand to meet its contractual obligations to CCC; second, that Ghent would properly deliver the grain due CCC on the delivery date. The Government has two different causes of action as a result of the facts alleged in the complaint. *First*, it has a cause of action for failure to maintain proper inventories of grain. This is the only cause of action against Transamerica, whose bond terminated on June 2, 1983. There was not alleged failure of delivery during the period covered by its bond. *Second*, CCC has a cause of action for failure to deliver its grain on October 15. This was during a period when Tri-State's bond was in effect. Thus it would appear that CCC has both causes of action against Tri-State.

We hold that an anonymous tip, such as received here,

does not put a person on sufficient notice of the facts indicated in the tip to trigger a statute of limitations until a reasonably prompt investigation either identifies the source as probably reliable or shows the information as probably accurate.

The district court correctly relied upon Eighth Circuit cases in holding that in cases involving fraudulent concealment, a cause of action accrues and the statute of limitations begins to run when the plaintiff receives notice of a possible clain and not later when the plaintiff verifies the existence of the claim. *See Goellner v. Butler*, 836 F.2d 426, 432 (8th Cir. 1988); *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 693 (8th Cir. 1981).

Neither of these cases involved anonymous tipsters. In *Goellner*, a patient received the information that put her on notice of a possible claim from her own bodily pain and reaction and from literature from the health provider, as well as her general knowledge of the medical procedure for which she sought redress on the ground of misrepresentation, fraud, and fraudulent concealment.

In *Buder*, the plaintiff purchaser of securities received the information held to put him on notice of his claim from the brokerage house itself, and the financial statements received from the companies in which he has invested.

No one knows to this day who supplied the information to CCC concerning the possibility of shortages in Ghent's grain inventory or where they got the information. We have little doubt but that if an attorney filed suit based on such an anonymous tip that later proved to be from an unreliable source or that slight investigation would prove to be false, Rule 11 sanctions would be seriously considered. Although the rule is that the tolling of a limitations statute does not continue until the basis of a claim is completely verified, it should be delayed until such time as the plaintiff has the opportunity to conduct some investigation of one of two things: either the identity of the tipster which would validate the probability of the essential accuracy of the information, or sufficient facts

to verify the probable accuracy of the information so received.

We need not decide whether the anonymouse tip was sufficient to require the CCC to investigate, since it did investigate. We need not decide if the running of the statute of limitations did not begin until October 15 when the grain was not delivered, since the complaint is within the period of limitations even if it begins to run when the CCC verified the apparent accuracy of the anonymous tip. We need not decide if the information CCC obtained on August 23 was in fact sufficient to trigger the running of the statute of limitations, because the claim was brought within six years of that date.

Diligent and able counsel apparently have found no case, for none have been pointed out to the Court, in which the knowledge of a plaintiff similarly situated to the CCC was based on information received from an unknown source. Our own canvass of the cases relied upon by the parties reveals none. There is little case law to guide this narrow decision. We can assume that if the corrected balance sheet was known to be from some source that should be reliable, the need for further investigation might not prevent the commencement of the limitations period. We can assume that if the information received were in some way self-proving, its validity evident on its face, the period might immediately commence to run. But the defendants appropriately do not even argue that such is the case here.

Typical of the cases cited which involve information that may have put plaintiff on notice of a claim, in addition to *Buder* and *Goellner* are: *Pinney v. Edward D. Jones & Co.*, 718 F. Supp 1419 (W.D. Ark. 1989) (financial information in public domain); *Jensen v. Snellings*, 636 F. Supp 1305, 1310 (E.D. La. 1986) (information received from attorney, bank representative, corporate officer, accountant's report); *Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340, 1343-49 (8th Cir. 1980) (slips confirming purchase of securities and monthly account statements); *Schmidt v. McKay*, 555 F.2d 30, 37 (2d Cir. 1977) (letters

from known sources); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (congressional hearing and industry-wide publicity). Most of the cases seem to turn on whether plaintiff properly evaluated the information received, not whether the information was accurate. Accuracy is the big question as to *any* information provided anonymously. Some reasonable time must be afforded to answer that question.

Although the relatively long statute here would leave ample time for the investigation required to establish the probable validity of the claim, the principle decided here would apply, no matter how short the statute. We, therefore, reverse the summary judgment which was entered by the district court on the ground that the statute of limitations barred the claim.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

# United States District Court
# Distict of Minnesota
# Fourth Division

**Civ. 4-89-714**

United States of America,
*Plaintiff,*

v.

Tri-State Insurance Co. of Minnesota and Transamerica Insurance Company,
*Defendants and Third-Party Plaintiffs,*

v.

Baumann-Furrie and Company, James Welsh and Adeline Welsh,
*Third-Party Defendants.*

**MEMORANDUM OPINION AND ORDER**

Mary E. Carlson, Esq., Assistant United States Attorney, 234 United States Courthouse, Minneapolis, MN 55401, appeared for plaintiff.

Mark Bloomquist, Esq., Meagher & Geer, 4200 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, appeared for defendant Transamerica Insurance Company.

L. H. May Jr., Esq., Bassford, Heckt, Lockhart, Truesdell & Briggs, 3550 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, appeared for third-party defendant Baumann-Furrie and Company.

Mark J. Johnson, Esq., Lang, Pauly & Gregerson, 4400 IDS Center 80 South Eighth Street, Minneapolis, MN 55402, appeared for defendant Tri-State Insurance Company of Minnesota.

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Plaintiff United States brought this contract action against Tri-State Insurance Company of Minnesota (Tri-State) and Transamerica Insurance Company (Transamerica) seeking damages. Jurisdiction is alleged under 15 U.S.C. § 714b(a) and 28 U.S.C. § 1345. Now before the court is Transamerica's motion for summary judgment.

On July 1, 1978, the Commodity Credit Corporation (CCC), a federal agency, entered into a Uniform Grain Storage Agreement with Ghent Grain and Feed, Inc. (Ghent) for the handling of grain controlled by the CCC. Ghent obtained bonds form Transamerica and Tri-State assuring the faithful performance of its duties as a licensed warehouseman. Transamerica's bonds encompassed the period from July 1, 1977 through June 2, 1983. Tri-State's bond encompassed the priod from June 2, 1983 to June 2, 1984.

During the period covered by the bonds, Ghent supplied financial statements to the CCC which allegedly overstated the quantity of grains on hand. On August 15, 1983, the CCC received a financial report indicating that Ghent had overstated its net worth by approximately $400,000. The CCC immediately initiated an investigation of Ghent. It inspected Ghent's warehouse beginning on August 22, 1983, and it concluded on August 23, 1983 that Ghent's financial statements overstated the amount of grain it had on hand.

On August 18, 1989, the government commenced this

aciton on behalf of the CCC seeking damages in excess of $200,000. The government claims Transamerica and Tri-State are liable under their bonds for the losses caused by Ghent. Tri-State filed a third-party complaint against James Welsh, Adeline Welsh, and Baumann-Furrie and Company (Baumann-Furrie) seeking indemnification or contribution based on negligence and contract. Transamerica filed a third party complaint against Baumann-Furrie seeking indemnification or contribution based on negligence.

Transamerica has moved pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings. The government and Baumann-Furrie responded with materials outside the pleadings. Transamerica adopted Baumann-Furrie's submissions and, pursuant to Rule 12(c), requested that its motion be treated as one for summary judgment under Rule 56. On a motion for summary judgment, all material facts and inferences are construed in favor of the non-moving party. *AgriStor Leasing v. Farrow,* 826 F2d 732, 734 (8th Cir. 1987). To defeat a motion for summary judgment, however, the non-moving party must show through specific evidence that there are material facts in dispute creating a genuine issue for trial; it may not rest only upon the allegations or denials of its pleadings. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

Transamerica contends that the government's claims against it are barred by the statute of limitations. The parties agree that the applicable statute of limitations is 15 U.S.C. § 714b(c) which provides, in part:

> No suit by or against the Corporation shall be allowed unless (1) it shall have been brought within six years after the right accrued on which suit is brought. . . .

The government contends that the statute of limitations was tolled under the doctrine of fraudulent concealment. It nontheless recognizes that its cause of action accrued at least when the CCC discovered that Ghent failed to perform under the storage contract.

Transamerica asserts the CCC discovered its cause of

action against Transamerica on August 15, 1983 when its officers received the restated financial statements and were notified that Ghent's net worth was overstated by $400,000. The government responds that the information the CCC received on August 15 was insufficient to apprise it of its claims. The government argues that the CCC did not verify that Ghent had breached its obligations until August 23, 1983, after the CCC's inspection of the warehouse.

Even where the doctrine of fraudulent concealment applies, a cause of action accrues and the statute of limitations begins to run when the plaintiff receives notice of a possible claim and not at a later date when the plaintiff verifies the existence of the cause of action. *See Goellner v. Butler,* 836 F2d 426, 432 (8th Cir. 1988); *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 693 8th Cir. 1981); *Jensen v. Snellings,* 636 F. Supp. 1305, 1309 (E.D. La. 1986).[1]

Transamerica has produced unrebutted evidence indicating the CCC received notice of its possible claim at least by August 15, 1983. The evidence indicates that, at that time, CCC possessed restated financial statements which revealed that Ghent had overstated its net worth by a large amount. The statments should have, and did, trigger an inquiry into the CCC's possible cause of action. CCC has not shown that it was entitled to have the statute of limitations tolled until it inspected the warehosue and verified its claims.

The statute of limitations period for the government's claims against Transamerica began to run at least by

[1] The court in *Jensen* succinctly expressed the principle in these terms:

> The limitations period is triggered by the discovery of facts which would cause a reasonable man to inquire whether he has suffered a legal wrong. The plaintiff need only possess a low level of awareness; he need not fully learn of the alleged wrongdoing. Knowledge of *all* facts is not required to set off the prescriptive clock. Thus, the clock begins to tick when a plaintiff senses "storm warnings,"... not when he hears thunder and sees lightning. 636 F. Supp. at 1309 (emphasisi in original; citation omitted).

August 15, 1983. The government's action against Transamerica is therefore untimely and should be dismissed. Consequently, Transamerica's third-party action is against Baumann-Furrie is moot and should be dismissed.

## ORDER

Accordingly, based upon the above, and all the files, records, and proceedings hereeinin, IT IS HEREBY ORDERED that:

1. The motion of defendant Transamerica Insurance Company pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings is treated as a motion for summary judgment under Fed. R. Civ. P. 56.
2. Transamerica's motion for summary judgment is granted, and plaintiff's claims against Transamerica Insurance Company are dismissed with prejudice.
3. The claims of third-party plaintiff Transamerica Insurance Company against Baumann-Furrie are dismissed as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.
Dated: June 14, 1990

Diane E. Murphy
United States District Judge

# United States District Court
# District of Minnesota
# Fourth Division

**Civ. 4-89-714**

United States of America,
*Plaintiff,*

v.

Tri-State Insurance Co. of Minnesota and Transamerica Insurance Company,
*Defendants and Third-Party Plaintiffs,*

v.

Baumann-Furrie and Company, James Welsh and Adeline Welsh,
*Third-Party Defendants.*

**MEMORANDUM OPINION AND ORDER**

Patricia R. Cangemi, Esq.. Assistant United States Attorney, 234 United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55401, appeared for plaintiff.

Mark J. Johnson, Esq., Lang, Pauly & Gregerson, 4400 IDS Center 80 South Eighth Street, Minneapolis, MN 55402, appeared for defendant Tri-State Insurance Company of Minnesota.

L. H. May Jr., Esq., Bassford, Heckt, Lockhart, Truesdell & Briggs, 3550 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, appeared for third-party defendant Baumann-Furrie and Company.

Plaintiff brought this contract action against defendants Tri-State Insurance Company and Transamerica Insurance Company seeking damages. Jurisdiction is alleged under 15 USC 714b(a) and 28 USC 1345. Now before the court is Tri-State's motion for summary judgment.

In 1978, the Community Credit Corporation (CCC), a federal agency entered into a contract with Ghent Grain and Feed, Inc. (Ghent) for the handling of grain controlled by the CCC. Ghent obtained bonds from Transamerica and Tri-State assuring its performance as a licensed warehouseman. Transamerica's bond encompassed the period from July 1, 1977 to June 2, 1983, and Tri-State's bond covered the period from June 2, 1983 to June 2, 1984.

During the period covered by the bonds, Ghent allegedly supplied false financial statement to the CCC. The financial statements allegedly overstated the amount of grain owned by the CCC. The CCC learned of the false financial statements in August 1983. It was sought recovery against Ghent in the bankruptcy court, but is was not fully compensated.

On August 18, 1989, plaintiff brought this action on behalf of the CCC seeking damages in excess of $200,000. It claimed that Transamerica and Tri-State were liable for its damages under the terms of the bonds. Tri-State filed a third-party complaint against Baumann-Furrie, James Welsh and Adeline Welsh, and Transamerica filed a thrid-party complaint against Baumann-Furrie.

On June 14, 1990, this court determined that plaintiff received notice of its possible claim on August 15, 1983 when it obtained Ghent's restated financial statement. Transamerica's motion for summary judgment was granted because plaintiff's claims were untimely under the applicable six-year statute of limitation.[1]

Tri-State now seeks summary judgment on the same basis. It sites the court's June 14, 1990 Memorandum Opinion and Order and asserts that plaintiff's claims against it are untimely and that collateral estoppel or the law of the case should lead to a ruling in its favor.

[1] The court also dismissed Transamerica's third-party complaint as moot.

Plaintiff responds by requesting reconsideration of the court's June 14, 1990 decision pursuant to Fed. R. Civ. P. 60(b)(6).[2] In support of its request, plaintiff argues that receipt of the financial statement on August 15, 1983 was insufficient to constitute notice of a claim against the bond issuers because Ghent's financial condition was unrelated to the failure to deliver the appropriate amounts of grain. It maintains that warehouses often have financial problems, but have adequate grain supplies and continue to meet their delivery obligations.

Plaintiff also maintains that its inspection on August 23, 1983, which confirmed grain shortages, did not constitute notice of a claim against the bonds because temporary grain shortages are common in the grain storage business. Plaintiff now argues - contrary to the position it took on Transamerica's motion - that its claim against the bond issurers arose only when Ghent failed to deliver the grain in October 1983.

The statute of limitations issue regarding Tri-State involves the same question presented by Transamerica's motion for summary judgment: when did plaintiff's claim accrue? *See* Memorandum and Opinion dated June 14, 1990. Since this legal issue has already been decided, law of case principles should generally control the decision on this motion. *See Arizona v. California*, 460 U.S. 605, 619 (1983).

Even if plaintiff had filed a proper motion for reconsideration, its latest arguments and affidavits would not persuade the court to change its previous ruling. After receipt of the finanicial statement on August 15, 1983, plaintiff took immediate action to inspect Ghent's grain supply and began proceedings to suspend Ghent's federal warehouse license. Within only eleven days, an inspection revealed grain shortages and Ghent's license was suspended. These undisputed facts show notice of a possible breach of Ghent's obligations. Tri-State has established its right to summary judgment.

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[2] Plaintiff has never filed a motion for reconsideration.

## ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

## ORDER

1. The motion of Tri-State Insurance Company of Minnesota for Summary judgment is granted, and plaintiff's claims against it are dismissed with prejudice.
2. The claims of third-party plaintiff Tri-State Insurance Company of Minnesota against Baumann-Furrie and Company, James Welsh, and Adeline Welsh are dismissed as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 12, 1990

Diane E. Murphy
United States District Judge

be able to testify to these dates to refer to that Exhibit 141?

A It would.

Q Would you tell the jury when you first became aware of problems at Ghent Grain and Feed based on those dates set out in Exhibit 141?

A On or about April the 15th, 1983.

Q And what happened at that time?

A A pencil copy of a current financial statement was received in our Minneapolis area office.

Q And how did your become aware of that fact?

A Mr. Bromley (sp.) who was in charge of our Minneapolis are office notified me on the phone.

Q Do you remember what he said?

A He said there was an indication that Ghent Grain and Feed Company's financial statements we have received previously had been overstating net worth by approximately $400,000.

Q And what is the next thing that happened?

A I suggested to Mr. Bromley that he suggested an immediate examination at that warehouse.

Q And was that done, when was the examination conducted?

A I believe it was within a week, I don't have the exact date available right here.

Q I think in one of the documents we have looked at before

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the examination report, I believe it shows that the examination was on or about the 22nd August, would that correspond with your recollection?

A Yes, I have a note here, special was performed on 8-22-83.

Q All right. When you say special, you're talking about apecial examination?

A Yes, when out to do a special.

Q And what happened after that?
A On August the 23rd of '83 the shortage which was found at that examination, the examination of August the 22nd of '83 was reported to headquarters office in Washington and to ASCS office in Kansas City, Kansas City commodity office.
Q And what happened after the shortage was reported?
A The normal procedure is that the commodity office will hold meeting and discuss the circumstances.
Q And did that happen in this case?
A I presume it did, yes.
Q Did the results of that meeting - what happened?
A As a result of that meeting on August the 25th, 1983 CCC removed the warehouse from the CCC list of approved warehouses.
Q Is that the kind of thing we talked about where you could no longer make loans against grain that's on deposit in



the warehouse?
A Yes.
Q And is that also the thing we talked about where the Commodity Credit will remove its grain from the warehouse?
A Yes.
Q All right. Then what happened?
A Then on the 26th of August, 1983 my office in Washington, D.C. which has suspension powers, I do not have suspension powers, I have to refer to Washington and they suspended the federal license of the warehouse.
Q And as of that point in time then was Ghent any longer licensed by either the state or the federal authorities?
A No.
Q Could it after that suspension?
A As a warehouse?
Q Yeah, could it after that suspension have operated as a warehouse?

A Not as a public warehouse.
Q Was the elevator ever relicensed?
A No.
Q To your knowledge was any further application for a license ever received from Ghent Grain and Feed?
A No.

MR. HALVORSON: I have no further questions.
THE COURT: Well, we're right at our noon...



was not reliable, isn't that true?
A I would not say, I would not say that it's a true statement.
Q In some cases they were reliable?
A Yes.
Q It was accurate only to the truthfulness, to the man that signed and certified it, isn't that true?
A Yes.
Q You didn't require certified public accountant or independent accountant to come in and certify that it had either been audited or reviewed?
A The law and the standards we were operating under prior to this chang only required that they submit the financial statement on our form.
Q I think your testimony, Mr. Heili, was that on or about August 22 after you had received a penciled financial statement with reqrd to Ghent Grain and Feed that you sent examiners to examine the warehouse, isn't that correct.?
A It was August the 15th, I believe, when we first made the move to do the exam and the exam was performed on August 22.
Q And if you would take a look at Exhibit 42, do you have that in front of you? Let's see if we don't have it here.

# SEQUENCE OF EVENTS

| | |
|---|---|
| 8-15-83 | Pencil copy received in Minneapolis Area Office. |
| 8-17-83 | Dick DeVries hand delivered pencil copy to National Warehouse Service Center, Kansas City. |
| 8-19-83 | Minneapolis Area Office mailed June 30, 1982 review audit certified by Baumann-Furrie Co. (11-3-82). This agreed with June 30, 1982 filed with NWSC on TW-51 form received November 19, 1982. |
| 8-22-83 | Special performed due to receipt of pencil copy of June 30, 1983 financial statement. |
| 8-23-83 | Shortage reported to NWSC-ASCS-WSB. |
| 8-22-83 | CCC removed. |
| 8-26-83 | AMS suspended federal license. |
| 8-26-83 | Warehouseman give examiner, Hartle his restated June 30, 1982 financial statement. |
| 8-29-83 | *Another Special was performed due to suspension. |
| 8-29-83 | Restated June 30, 1982 financial statement analyzed in NWSC. |

NWSC never received an June 30, 1983 audited financial statement.

*Examiner discovered that warehouseman has issued approximately 60 warehouse receipts to producers on grain which was either priced or on contract at time of August 22, 1983 Special Examination.

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No. 91-1106

# In the Supreme Court of the United States

OCTOBER TERM, 1991

TRANSAMERICA INSURANCE COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*

STUART M. GERSON
*Assistant Attorney General*

BARBARA C. BIDDLE
SUSAN M. SLEATER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the statute of limitations for the United States' action against the sureties of a bankrupt grain storage company began to run upon receipt of an anonymous tip left under an office door.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A6, is reported at 946 F.2d 581. The opinions of the district court, Pet. App. A7-A15, are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 7, 1991. The petition for a writ of certiorari was filed on January 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Beginning in July, 1979, the Commodity Credit Corporation (CCC), a wholly owned government corporation, 15 U.S.C. 714-714p, contracted with Ghent Grain and Feed, Inc., to store grain. Ghent submitted a financial statement at the time it entered into the contract, and thereafter it submitted semiannual financial reports and annual financial statements. CCC evaluated Ghent's performance as satisfactory, and it renewed the storage contract on a yearly basis until 1983.

On August 15, 1983, two months after an annual review and CCC's decision to renew Ghent's contract, an anonymous party slipped a document under the door of a CCC satellite office. The document, a Ghent draft financial statement containing pencilled corrections, suggested by implication that Ghent had greatly misstated its assets. Pet. App. A2; Pet. 3-5 & n.3.

Within eight days, the government initiated an investigation. The investigation confirmed irregularities at the warehouse and a grain shortage. On August 26, 1983, CCC suspended Ghent's operating license, and it later ordered that Ghent deliver the stored grain by October 15, 1983. Pet. App. 3. Ghent failed to deliver the grain and instead, on November 1, 1983, filed for bankruptcy protection. Ghent's assets were eventually distributed in the bankruptcy proceeding.

After the distribution, CCC held uncompensated grain receipts with an estimated value of $205,738. The government requested that sum from Ghent's sureties, petitioners Transamerica Insurance Company and Tri-State Insurance Company of Minnesota. They refused to pay. The United States then filed this action on

August 18, 1989, seeking recovery from Transamerica and Tri-State under the surety bonds they issued. Pet. App. A2-A3; C.A. App. 54-55, 56-57; Pet. 7-8.[1]

2. The district court ruled that the United States' action was time barred, because the claim was filed three days beyond the six-year statute of limitations. See 15 U.S.C. 714b(c).[2] The district court concluded that the claims against the sureties based on Ghent's fraudulent concealment of its grain shortfalls accrued on the date that the CCC discovered the document anonymously slipped under the CCC office door, rather than on the date that the CCC officials had ascertained the accuracy of the information suggested therein. Pet. App. A9-A10. The court reasoned that the receipt of the anonymous tip was a "notice of a possible claim." *Id.* at A10.

3. The court of appeals reversed. It held that "an anonymous tip, such as received here, does not put a person on sufficient notice of the facts indicated in the tip to trigger a statute of limitations until a reasonably prompt investigation either identifies the source as probably reliable or shows the information as probably

[1] The United States delayed the filing of its legal action against the sureties after discussions with the sureties indicated that the bankruptcy distribution and other ongoing state court litigation would provide full satisfaction of its claim. See C.A. App. 49-60.

[2] Section 714b(c) states in relevant part:

> No suit by or against the [Commodity Credit] Corporation shall be allowed unless * * * it shall have been brought within six years after the right accrued on which suit is brought * * *.

accurate." Pet. App. A3-A4. The court observed that there was "little case law to guide this narrow decision." *Id.* at A5. It noted that in the typical case involving the receipt of information that may have put a plaintiff on notice of a claim, the issue is "whether plaintiff properly evaluated the information received, not whether the information was accurate." *Id.* at A6. "Accuracy is the big question as to *any* information provided anonymously. Some reasonable time must be afforded to answer that question." *Ibid.* The court accordingly held that the action was timely as to all of the United States' claim.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. The court simply applied an established rule to the particular and unusual factual situation presented here. Further review is unwarranted.

1. The court of appeals stated that in the case of a fraudulently concealed claim, "a cause of action accrues and the statute of limitations begins to run when the plaintiff receives notice of a possible claim and not later when the plaintiff verifies the existence of the claim. *See Goellner* v. *Butler*, 836 F.2d 426, 432 (8th Cir. 1988); *Bader* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 693 (8th Cir. 1981)." Pet. App. A4. Petitioners agree that this is the established and appropriate rule. Pet. 17 & n. 8. Thus, the only question here is whether the court of appeals correctly applied that settled test to the particular factual situation presented in this case.

2. The court properly ruled that the government's receipt of an anonymous tip should not be treated as "notice of a possible claim" until the government has had "the opportunity to conduct some investigation of one of two things: either the identity of the tipster which would validate the probability of the essential accuracy of the information, or sufficient facts to verify the probable accuracy of the information so received." Pet. App. A4-A5. As the court explained, an anonymous tip may provide a basis for investigation, but it does not have sufficient reliability, by itself, to serve as notice of a possible claim. Thus, it is appropriate to continue to toll the statute of limitations "until a reasonably prompt investigation either identifies the source as probably reliable or shows the information as probably accurate." *Id.* at A4.

3. There is no reason for further review of this matter. Contrary to petitioners' assertions, the court of appeals has not "grafted a new exception" to an established rule (Pet. 16), nor has it adopted an "actual knowledge" test (Pet. 18). The court's "narrow decision" (Pet. App. A5) simply holds that a mere anonymous tip like the one received here is not by itself notice of a possible claim. Petitioners were unable to direct the court of appeals to any prior decision addressing that novel question, *ibid.*, and they cite no such decision in their petition for a writ of certiorari. See Pet. 19-21. Thus, there is no pressing need for this Court to resolve this interlocutory issue of first impression, which is likely to arise with no greater frequency in the future than it has in the past.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

STUART M. GERSON
*Assistant Attorney General*

BARBARA C. BIDDLE
SUSAN M. SLEATER
*Attorneys*

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